

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 9, 2008 Session

IN RE: D.P.M., S.H., AND Y.M.

**Appeal from the Juvenile Court for Macon County
No. 03-160444 John P. Hudson, Judge**

No. M2007-02741-COA-R3-PT - Filed October 23, 2008

The Department of Children's Services removed three children from their parents' home after a reported incident of physical abuse. The court found that the mother had committed severe child abuse, and the Department subsequently filed a petition to terminate parental rights. The trial court granted the petition. This court reversed as to the mother because, although the Department had established a ground for termination, we found that it had not proved by clear and convincing evidence that termination of the mother's rights was in the children's best interests. The Department subsequently filed a second petition to terminate the mother's parental rights and the trial court again granted the petition. This time we affirm, because the proof shows by the requisite standard that termination is in the best interests of the children.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed

PATRICIA J. COTTRELL, P.J., M.S., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and RICHARD H. DINKINS, JJ., joined.

William Joseph Butler, Lafayette, Tennessee, for the appellant, T.M.

Andrew A. Stanford, Guardian Ad Litem, Lafayette, Tennessee, Pro Se.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth C. Driver, Senior Counsel, for the appellee, State of Tennessee Department of Children's Services.

OPINION

I. THE FIRST PETITION FOR TERMINATION

This is the second time these parties have been before this court. *See In the Matter of D.P.M., S.H. & Y.M.P.*, No. M2005-02183-COA-R3-PT, 2006 WL 2589938 (Tenn. Ct. App. September 8, 2006) (no Tenn. R. App. P. 11 application filed). The mother, T.M., ("Mother") is an immigrant from Mexico who lives and works in Macon County. Her daughter, D.P.M., was nine

years old on February 6, 2002, when the incident occurred that caused her to be removed from her mother's custody.

D.P.M. was brought to the Lafayette Police Department with two black eyes and a knot on her head, which she claimed resulted from her mother hitting her on the head with a frying pan. She was subsequently taken into the custody of the Department of Children's Services ("DCS") and placed in foster care with friends of the family that lived nearby. Mother's son, two year old S.H., was placed in foster care with the same family.

Mother's second daughter, Y.M., was born after DCS filed its first petition for termination of the mother's parental rights. Y.M. was taken into DCS custody three days after she was born, and her name was added to the petition. Mother gave birth to a fourth child, another girl, at about the time of the first hearing on the petition to terminate Mother's parental rights to the oldest three children. That child went into foster care at birth, and is currently in the custody of her Father. Mother's parental rights to her youngest child are not at issue in the current proceeding.

After an adjudicatory hearing, the Juvenile Court of Macon County found that the mother had committed severe child abuse and that D.P.M. and S.H. were dependent and neglected. Mother filed an appeal of the court's order to Circuit Court, but voluntarily dismissed her appeal before it could be heard, thereby rendering her unable to contest the finding of severe child abuse in subsequent termination proceedings.

On May 8, 2003, DCS filed a petition to terminate the parental rights of Mother and of the men who had fathered her three children. The fathers did not contest the termination of their rights. The hearing on the petition began in May of 2005 and extended over several days. The parties were represented by counsel, and the interests of the children were represented by a guardian ad litem. Testifying witnesses included Dr. Myrna Kemp, a therapist who had counseled D.P.M., three DCS caseworkers who had worked with the family, the foster mother, and the mother herself, who testified through an interpreter. The deposition of Dr. Frederick Cardona, another therapist who had counseled D.P.M. and Mother, was also entered into evidence. Dr. Cardona, a Spanish-speaking psychotherapist, was brought into the case because Dr. Kemp thought it would be important for the family to be seen by a therapist who was familiar with their language and culture.

Much of the testimony at trial focused on the best interests of the children, since even after grounds for termination have been proven, the court may not terminate a parent's rights unless it is also proven by clear and convincing evidence that such termination is in the best interest of the children. Tenn. Code Ann. 36-1-113(c). The evidence on best interest was decidedly mixed at trial. Dr. Kemp and the three DCS social workers testified that on the basis of their observations, termination of Mother's parental rights was in the children's best interest. Dr. Kemp also testified that it was important for D.P.M. to maintain a connection to her Hispanic heritage, and she affirmed the value of D.P.M. maintaining a relationship with her mother, so long as the child was in foster care.

Dr. Cardona testified that on the basis of his own observations and on psychological testing he had performed that it was in D.P.M.'s best interest that she be ultimately reunited with her mother. Although D.P.M. herself did not testify in court, the evidence showed that she had experienced great ambivalence about her possible alternatives. At times she declared that she wanted to be adopted; at other times that she wanted to return to her mother.

At the conclusion of testimony, the guardian ad litem gave a closing statement in which he recounted in detail a history of conversations with D.P.M. over a period of three years. He noted her love for her mother and her continuing ambivalence as to whether it would be better for her to be adopted or to be returned to her mother's care. He stated that termination was a big step, that D.P.M. wanted "to maintain the integrity, what is left, of her family," and he concluded that "predicated upon what I believe to be in the best interest of the long term stability and benefit to these children...I do not at the present time support the state's petition to terminate [Mother's] parental rights."

The trial court then announced its conclusion that multiple grounds for termination had been proven by clear and convincing evidence, including abandonment, persistence of conditions, and the commission of severe child abuse. *See* Tenn. Code Ann. 36-1-113(g). The trial court also declared that there was clear and convincing evidence sufficient to find that termination of Mother's rights was in the best interests of the children. Mother appealed to this court and filed a motion in the trial court to stay its order pending the results of her appeal so she could continue to exercise visitation with the children. The trial court denied the motion to stay, but this court granted the stay under Rule 7 Tenn. R. App. P.

On appeal, we carefully reviewed the entire record and found that the only ground for termination that had been proved by clear and convincing evidence was the prior judicial finding of severe abuse. Turning to the question of best interest, we noted numerous factors weighing against the trial court's determination, including D.P.M.'s frequently expressed desire to maintain contact with her mother, the testimony of Dr. Calderon, possible instability in the children's current situation with their foster parents, and the reluctance of the guardian ad litem to support termination. We accordingly determined that DCS had not proved by clear and convincing evidence that termination of the mother's parental rights was in the children's best interest, and we reversed the trial court.

II. THE CURRENT PETITION

As we pointed out in our opinion, our reversal of the trial court did not change the then-existing custodial arrangements for the children. They remained in foster care, and Mother continued to have access to them through visitation, although the frequency of visitation declined over time, from weekly or bi-weekly to once a month. In May or June of 2005, the children were all moved from the home of their original foster parents, and they came into the care of the Ps, a couple who initially expressed a desire to adopt all three, but later expressed reservations about adopting D.P.M. After about a year, D.P.M. was transferred into the care of the another couple, the Ws, who now wish to adopt her.

The Department filed a new petition for termination on January 22, 2007. The petition asserted that while the children had established strong bonds with their foster parents, Mother had failed to make a lasting adjustment in her conduct, conditions or circumstances such as to make it in the best interest of the children to be returned to her custody any time in the foreseeable future. A Spanish-language translation of the petition was also prepared. It was read to Mother and was explained to her in detail.

The case was tried on September 25, 2007. Judge John Hudson sat by interchange in place of Judge Ken Witcher, who had presided over the first termination trial. The guardian ad litem from the earlier proceeding remained on the case and participated in the questioning of witnesses. The parties stipulated that grounds for termination had been established in the trial court's prior proceeding and had thus become the law of the case.¹ Therefore, the only remaining issue to be litigated was the best interest of the children, and the parties agreed that they would only submit proof as to events which had occurred since the previous hearing.

Testifying witnesses for the Department included Dr. Kemp and DCS case worker Amy Burchett, who had both testified in the earlier termination hearing. Other witnesses were psychological examiner Thomas Netherton, Mother, Mother's boyfriend/partner, and both foster mothers. D.P.M., who was fourteen years old at the time of the hearing, also took the stand, unlike in the earlier hearing.

Dr. Kemp testified that she did not have any contact with Mother since the first termination hearing, but that D.P.M. had asked her to continue counseling, and that she had conducted at least five sessions with the children since the first termination hearing. She characterized three of those as "emergency sessions." They occurred in March of 2007, around the time that the children's youngest sibling was returned to the custody of her father. Dr. Kemp reported that the children were anxious and upset because they were afraid that Mother would hurt the child. In a more recent session, a week before the termination hearing, a tearful D.P.M. told Dr. Kemp that she was ready to say good-bye to her mother, that she was ready to get on with the rest of her life, and that her mother and father had robbed her of her childhood. Dr. Kemp testified that D.P.M. urgently needed to achieve stability in her life and to end the uncertainty caused by the ongoing legal struggle over termination.

Dr. Kemp also testified that D.P.M. and S.H. appeared to be very happy in the homes of their foster parents. She noted that when he was younger, S.H. was very hard to control and had a lot of anger issues, but that since living with Mr. and Ms. P he had become much better behaved. He was doing well in school and had become involved in sports, which served as a safe outlet for his energy and some of his emotions. (Mr. P is an athletic coach.) Since S.H. had been removed from his

¹Tennessee Code Annotated § 36-1-113(g)(4) establishes as a ground for termination that "the parent . . . has been found to have committed severe child abuse as defined in § 37-1-102, under any prior order of a court . . . against the child who is the subject of the petition or against any sibling or half-sibling of such child . . ." Herein, the earlier court determination that Mother had committed severe child abuse against D.P.M. was not appealed and remains the final order on that issue.

mother's home when he was only two years old, he had not bonded very much with her, and he did not want to return to her custody. Dr. Kemp opined that if he were ever returned, he would probably revert to his former unproductive behavior. As for Y.M., Dr. Kemp testified that she had not bonded at all with Mother, that she considered the Ps her parents in every way, and that it would be utterly devastating to her if she had to leave them. Finally, Dr. Kemp testified that she had no reservations whatsoever in recommending to the court that Mother's rights to all three children be terminated so they could be adopted by their foster parents.

Thomas Netherton did not do counseling, but he prepared detailed mental assessments and psychological evaluations of Mother, D.P.M., and S.H., which were entered into the record.² He testified, consistently with those reports, that Mother had anger control issues, violent tendencies, and difficulty coping with stress. Interestingly, he reported that Mother acknowledged hitting D.P.M. in the face with a frying pan, but that she insisted that she did not hit her hard. He also reported that D.P.M. had told him that she was afraid that if the children were returned to the mother's care, Mother would run away with them to Mexico. Mr. Netherton stated that it was urgent for D.P.M. to achieve stability and permanency because the uncertainties of her current situation kept her on an emotional roller coaster, and that S.H. likewise suffered from depression and anxiety because of uncertainty about his future. In response to questioning, Mr. Netherton testified that in his opinion it was in the best interest of the two children to have their mother's parental rights terminated so they could be adopted.

Amy Burchett had been a case worker for Mother and her family prior to the first termination hearing. She was subsequently reassigned, but then picked the case up again in September of 2006. Ms. Burchett testified that subsequent to our reversal of the trial court's prior termination order, the Department furnished Mother with therapeutic visitation, mental health counseling, and domestic violence counseling.³ Ms. Burchett was present at supervised visitation between Mother and the children and also had the opportunity to observe interactions between the children and their foster parents. She noted that D.P.M. appeared to be very comfortable with her foster parents and to rely upon them for guidance. In contrast, she was often very cautious and reserved around her mother during visitation. Ms. Burchett testified that she had seen Mother lose her temper with D.P.M. during visits and that at times she had yelled at her.

Like Dr. Kemp, Ms. Burchett observed that S.H. had undergone positive changes since becoming a member of the P household. She stated that he had previously been hyperactive and defiant, and prone to attention-seeking behavior, but that he had now become much calmer, more polite and more mature, and had started directing his energies appropriately. She testified that he

²Mr. Netherton testified that he examined Mother with the help of an interpreter and Spanish language versions of the psychological tests he administered.

³An affidavit of reasonable efforts submitted by Amy Burchett showed that among other things the Department also provided translation services for meetings, visits, phone communication and court proceedings, that it had located bilingual counselors for Mother and her boyfriend, and that it had provided Mother with transportation to counseling sessions on at least ten occasions.

was usually reluctant to visit Mother, frequently asking before a visit, “do I have to go?” The case worker asked what he enjoyed about visits with his mother, and he said, “she gives me money.” Ms. Burchett observed that he avoided contact with Mother during the visits and that he often chose instead to sit by himself and play video games.

Ms. Burchett also testified that four year old Y.M. enjoys visitation, but mainly because she wants to see her siblings. She calls the Ps mom and dad, but seems a bit confused about Mother. For a while, she thought Mother’s name was “Ola,” because Mother greeted her at visitation with the Spanish word for hello. According to Ms. Burchett, when Y.M. becomes upset during visitation, she goes to Ms. P for comfort, not to Mother, and when Ms. P is not there, she goes to her siblings. Ms. Burchett was asked if in her opinion Mother had established a meaningful relationship with the children. She responded, “It appears that the relationship between [Mother] and [the three children], is one of mistrust, fear, and a lack of understanding and empathy.” Like Dr. Kemp and Mr. Netherton, Ms. Burchett testified that it would be in the best interest of the children for Mother’s parental rights to be terminated.

D.P.M. testified that she had a very good relationship with her foster parents, that she could talk to them, felt very safe with them, and that she wanted them to adopt her. She was questioned on direct and on cross-examination about her relationship with her mother, and she testified directly and forcefully that although she loved Mother, she was afraid that if she was returned to her custody, she would be abused physically or emotionally. She testified that she did not trust Mother to look out for her best interests or those of her younger siblings. She said that her mother had changed a little, but not a lot.

D.P.M. acknowledged that during one emotional visit, her mother had asked for her forgiveness, and had cried; that they had embraced and that D.P.M. told her mother that she loved her and forgave her for the past. But on other occasions Mother had yelled at her for going to a different foster family from her siblings and had blamed her for allowing the family to become divided. D.P.M. stated that “I think I always enjoy myself when I go to see my mom because I love her; she’s my mom; but I just get really, really stressed out by almost every single visit. I get stressed out; I get sick, and that’s not healthy.” She also declared that “I should be in school worrying about teenage stuff, not worrying about making a big decision in my life.” When asked point-blank if she wanted her Mother’s parental rights to be terminated, she answered in the affirmative without any suggestion of uncertainty.

Both foster mothers testified briefly. Ms. P testified that she and her husband love S.H. and Y.M. and would like to adopt them. She also testified that the children were very affectionate with them, that S.H. calls them mom and dad, and that Y.M. calls them mommy and daddy. Asked about visitation with Mother, Ms. P testified that S.H. often argues about going, but that she insists that S.H. visit because Mother is his mom and that he needs to see her and to be respectful to her while he is there. Y.M. is more positive about visitation because she is eager to see D.P.M. and her younger sister. Ms. P introduced photos of the children with the foster parents, as well as a picture of S.H. in his football uniform.

Ms. W testified that she and her husband love D.P.M and would be interested in adopting her. She stated that D.P.M. is the kind of child who gets along with everybody, including all the members of the W's rather large family, which includes a number of other foster children. Ms. W introduced a photo showing D.P.M. with her dog, another picture of D.P.M. with a drama team at their church and family pictures showing D.P.M. with the foster parents and with the other children of the family.

The defense called Mother to the stand, and she testified through an interpreter. Her testimony showed that she has never stopped hoping for the return of her children or making efforts to achieve that goal. She has continued to work at a Macon County factory and has tried to comply with court orders and the recommendations of DCS, including undergoing therapeutic classes and domestic violence counseling. Photographs entered into the record show her mobile home with an above ground swimming pool, and the children apparently playing happily. Mother testified that she always prepares for visits by cleaning the house and cooking for the children. She testified that sometimes the children do not come for a planned visit, and she has to throw food out. A photo in the record from one of those cancelled visits shows a neatly set table with a platter in the middle heaped with food.

The defense also called Mother's boyfriend and the father of her youngest child to the stand, and he testified briefly through an interpreter. He testified that he was present at almost every visitation by the other children, that Mother plans activities for them, and that they always seem to enjoy themselves. He denied that he had ever seen Mother yell at the children or threaten them.

In his closing statement, the guardian ad litem stated that he had been involved in this case and had contact with the children for over five and a half years, some of them ever since birth, and that they had made tremendous progress in the two years since the last termination proceeding. He declared that he believed that termination was now in the children's best interests in light of D.P.M.'s wishes, the weakness of the younger children's bonds with the mother, and the need for everybody to get on with their lives after so many years in limbo. At the conclusion of argument the trial court took the matter under advisement.

On November 28, 2007, the trial court filed its Final Decree of Guardianship, granting the Department's petition for termination of Mother's parental rights. The court noted the parties' stipulations and it stated its findings of fact and conclusions of law, which explained the connections between the evidence adduced at trial and the factors the courts are directed to consider in termination cases under Tenn. Code Ann. § 36-1-113(i) when determining the best interest of the children involved. *See* Tenn. Code Ann. § 36-1-113(k)(requiring the trial court to make specific findings of fact and conclusions of law in parental termination cases). The court concluded that there was clear and convincing evidence that termination of Mother's rights was in the best interest of the children. This appeal followed.

III. THE STANDARD OF REVIEW

Under both the United States and Tennessee Constitutions, a parent has a fundamental right to the care, custody, and control of his or her child. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *In re Swanson*, 2 S.W.2d 3d 180, 187 (Tenn. 1999); *Nash-Putnam v. McCloud*, 921 S.W.2d 170, 174-75 (Tenn. 1996); *In Re Adoption of a Female Child*, 896 S.W.2d 546, 547-48 (Tenn. 1995); *Nale v. Robertson*, 871 S.W.2d 674, 678 (Tenn. 1994). However, this right is not absolute, for the state may interfere with parental rights when there is a compelling state interest. *Santosky v. Kramer*, 455 U.S. 745, 747 (1982); *Nash-Putnam*, 921 S.W.2d at 174-75.

Our legislature has defined those situations in which the state's interest in the welfare of a child justifies interference with a parent's constitutional rights by setting forth grounds on which termination proceedings can be brought. Tenn. Code Ann. § 36-1-113(g). Parental rights may be terminated only in those statutorily defined circumstances. *Osborn v. Marr*, 127 S.W.3d 737, 739 (Tenn. 2004) (holding that the statutes on termination of parental rights provide the only authority for a court to terminate a parent's rights); *In re M.W.A.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998).

Because the decision to terminate parental rights affects fundamental constitutional rights, courts must apply a higher standard of proof when adjudicating termination cases. *Santosky*, 455 U.S. at 769; *In re M.W.A.*, 980 S.W.2d at 622; *O'Daniel v. Messier*, 905 S.W.2d 182, 186 (Tenn. Ct. App. 1995). A court may terminate a person's parental rights only if the party seeking termination proves by clear and convincing evidence (1) the existence of at least one statutory ground and (2) that termination of the parent's rights is in the best interest of the child. Tenn. Code Ann. § 36-6-113(c); *In re F.R.R., III*, 193 S.W.3d 528 (Tenn. 2006); *In re Valentine*, 79 S.W.3d at 546 (Tenn. 2002). Only one ground need be proved to support the termination of parental rights, so long as it is proved by clear and convincing evidence. *In the Matter of D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003).

Once any single ground for termination has been proven, the court must then turn to the question of best interest. The burden rests on the petitioner to prove by clear and convincing evidence that termination of the rights of their parents is in the best interest of the child or children involved, keeping in mind that termination has the effect of “irrevocably severing the relationship between the parent and the child.” *White v. Moody*, 171 S.W.3d 187, 193-194 (Tenn. Ct. App. 2004).

In order to be clear and convincing, evidence must eliminate any serious or substantial doubt about the correctness of the conclusions to be drawn from the evidence. *In re Valentine*, 79 S.W.3d at 546 (citing *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n.3 (Tenn. 1992)). Such evidence should produce in the fact-finder’s mind a firm belief or conviction as to the truth of the allegations sought to be established. *In re M.L.P.*, 228 S.W.3d 139, 143 (Tenn. Ct. App. 2007); *In re Georgianna H.*, 205 S.W.3d 508, 516 (Tenn. Ct. App. 2006). In contrast to the preponderance of the evidence standard, clear and convincing evidence should demonstrate that the truth of the facts

asserted is “highly probable” as opposed to merely “more probable” than not. *In re M.A.R.*, 183 S.W.3d 652, 660 (Tenn. Ct. App. 2005) The burden is on the party seeking to terminate parental rights to present clear and convincing evidence that grounds exist and that termination would serve the best interests of the children. *In re Valentine*, 79 S.W.3d at 546 (quoting *Hodges v. S.C. Toof & Co.*, 833 S.W.2d at 901 n.3.)

When we review a trial court’s decision to terminate parental rights, we must first review the trial court’s specific findings of fact in accordance with Tenn. R.App. P. 13(d). Under that standard, each of the court’s specific findings of fact is presumed to be correct, unless the evidence preponderates otherwise. Second, we must review the trial court’s conclusions of law *de novo*, without according any presumption of correctness to its conclusions as to whether the facts as determined by the trial court or supported by the preponderance of the evidence clearly and convincingly establish the elements required to terminate a biological parent's parental rights. *In re Giorgianna H.*, 205 S.W.3d at 516; *State Dep't of Children's Servs. v. A.M.H.*, 198 S.W.3d at 762.

IV. THE BEST INTEREST OF THE CHILDREN

A. THE APPLICATION OF THE STATUTORY FACTORS

Under Tenn. Code Ann. § 36-1-113(g)(4), one ground for termination of a parent’s rights is a prior judicial finding that the parent had committed severe child abuse against the child who is the subject of the petition or against any sibling or half-sibling of such child. There is no dispute that this ground has been established in this case. Thus, the only question before us is whether the trial court correctly found that the evidence established by the clear and convincing standard that termination of Mother’s parental rights is in the best interest of her children.

Tenn. Code Ann. § 36-1-113(i) sets out a list of factors for the court to consider in determining the best interest of the children who are subject to of a petition for termination of parental rights:

- (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
- (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
- (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
- (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
- (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;
- (6) Whether the parent or guardian, or other person residing with the parent

or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;

(7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;

(8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or

(9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

The evidence as to some of these factors favor the mother. We note that the photos of Mother's home that were entered into the record do not indicate any unsafe physical conditions. It appears to be neat and organized, both inside and out, with a large expanse of mowed yard around it, and a pool for the children to play in. Further, no evidence was presented of any use of alcohol or controlled substances in the previous two years which might render it unsafe for Mother or her boyfriend to care for the children.

Mother has also maintained regular visitation with the children. The proof showed that she has been very consistent about scheduled visits, usually putting a lot of effort into getting the home ready so the children can have an enjoyable experience, and she always gives them little gifts of money or toys when they arrive. On several occasions, visits were cancelled at the last minute because of the children's illnesses, and Mother was left waiting with food on the table. There can be no doubt as to Mother's disappointment during these occurrences or her dedication to the goal of being reunited with her children.

However, other factors weigh in favor of termination. While the physical conditions in Mother's home appear to be safe, it is unclear whether she has made such an adjustment of conduct or of mental status so as to make it safe for the children to be with her. The children originally came into the Department's custody after Mother hit D.P.M. on the head with a frying pan. Psychological testing showed that Mother still has anger control issues, violent tendencies, and difficulty coping with stress. There was testimony that Mother became angry during some of the visits and yelled at her daughter. D.P.M testified that although she loved Mother, she was afraid that if she was returned to her custody, she would be abused physically or emotionally. She also expressed concern about the safety of her siblings if they were returned to Mother's custody.

Further, the evidence shows that despite the time she has spent in visitation with her younger children, Mother has not managed to establish a meaningful relationship with them. S.H. only visits her reluctantly and avoids contact with her during those visits. When asked what he likes most about these visits, he says it is the money she gives him. As for Y.M., she was removed from her mother's care at such a young age that she was not able to bond with her at that time. There are no indications that a meaningful bond has arisen between mother and daughter since then. Y.M. enjoys her

visitation, but the main attraction is the opportunity to play with her siblings.

Mother has always been a presence in D.P.M.'s life, so their relationship must be characterized as meaningful. However, while D.P.M. loves her mother, she does not trust her, and she has declared that she is ready to move on with her life. In D.P.M.'s opinion as well as that of the professionals who testified at trial, the negatives of the relationship between D.P.M. and her mother outweigh the positives. As Amy Burchett stated, "It appears that the relationship between [Mother] and [the three children], is one of mistrust, fear and a lack of understanding and empathy."

A factor that is significant in this case involves the potential consequences of a return of the children to Mother's care. The evidence showed that such a drastic change would likely have a devastating emotional and psychological effect on each one of them. The testimony of D.P.M. shows that even visiting her mother causes her to suffer stress and anxiety. She complained that her mother had robbed her of her childhood. Since she is now enjoying doing "normal teenage things," and experiencing the mental and emotional growth that comes from such activities, she rightfully fears that she would be robbed of her adolescent years as well if she were permanently returned to her mother's care.

Dr. Kemp and Amy Burchett both testified as to the enormous progress S.H. had made in his social behavior, in the control of his emotions, and in finding productive channels for his energy while in the care of his foster parents. Dr. Kemp testified that all those improvements would likely vanish if he were returned to Mother's care and that he would quickly revert to his previous dysfunctional patterns of behavior. As for Y.M., she has never known any parents other than the Ps, whom she refers to as mommy and daddy. A transfer to Mother's care would be equivalent to losing her parents, a traumatic event for any child.

Of course, a determination against termination of Mother's rights would have no effect on the custody of the children, and a return to Mother's custody does not appear imminent. That is the point and purpose, however, of the factors regarding a parent's change of circumstances or conditions and a parent's lasting adjustment. While the law provides an opportunity for a parent to make such changes so that return of the child is possible, that opportunity is not boundless in duration. That is because it is seldom, if ever, in a child's best interest to remain indefinitely in foster care without the possibility of attaining the stability of a permanent home through adoption.

Once grounds for termination have been established, the best interests of the children become the paramount focus of the trial court, and the children's best interest must be viewed from their perspective rather than from that of the parent. *In re Audrey S.*, 182 S.W.3d 838, 877-79 (Tenn. Ct. App. 2005); *White v. Moody*, 171 S.W.3d at 192-94.

The proof in this case shows that continuation of the parental relationship with Mother is a source of anxiety and instability for the children and that it prevents them from being adopted into the families they have bonded with. Thus, from the children's perspective, it is in their best interest that Mother's parental rights be terminated.

For the past few years the children have been with loving and supportive foster parents with whom they have bonded strongly. The foster parents wish to adopt the children, and there is nothing in the record to suggest that this goal is unrealistic. The children have thrived in the stable and supportive environments they have experienced, where the foster parents were able to meet their emotional and developmental needs. At the same time, Mother only achieved marginal improvements in her situation and in her understanding of the requirements of child-rearing.

We conclude that the evidence in this case clearly and convincingly shows that termination of Mother's parental rights was in the best interest of all three children.

B. OTHER ARGUMENTS

Mother's attorney offers several arguments to suggest that the trial court should have reached a different result. First, he notes the extraordinary efforts the mother has made to regain custody of her children. The proof shows that Mother maintained steady employment throughout the course of this case and that she did everything that the Department required of her in hopes that the children would ultimately be returned to her.

While Mother's efforts are admirable, our courts have recognized that a determination of best interest is controlled by different considerations from a determination of grounds for termination. In the grounds inquiry, a parent's constitutional rights are given significant weight, and courts primarily look at the conduct of that parent. However, as explained above, once grounds have been established, the best interests of the children become the paramount focus of the trial court. *In re Audrey S.*, 182 S.W.3d at 877. Thus, although Mother has continued to make an effort to maintain or establish a relationship with her children, we must look at the children's best interests, not Mother's. The proof shows that continuation of the parental relationship with Mother is a source of anxiety and instability for the children and that it prevents them from being adopted into the families they have bonded with.

Mother also complains that the Department has not done enough to help her regain custody of the children. Such an argument invokes the Department's statutory responsibility to make "reasonable efforts" to reunify children and their parents after removing the children from their parents' home. *See* Tenn. Code Ann. § 37-1-166. While the Department is no longer required to make reasonable efforts to reunify a family where the ground of severe child abuse has been judicially established, Tenn. Code Ann. § 37-1-166(g)(4), the Department did provide Mother with services.

DCS Caseworker Amy Burchett testified that after the first termination hearing, DCS furnished Mother with therapeutic visitation, mental health counseling, and domestic violence counseling, and that Ms. Burchett also accompanied the children during regular supervised visitation with the mother. Since the children were removed from Mother's care because of the physical abuse she inflicted on her daughter, domestic violence counseling and mental health counseling were directly relevant to achieving the sort of "lasting adjustment" of conditions towards which Tenn.

Code Ann. § 36-1-113(i)(2) directs the Department to make its reasonable efforts. Further, the continuation of visitation under the supervision of the Department gave Mother the opportunity to establish or maintain meaningful relationships with her children.

It is unclear what more the Department could have done to render it in the best interest of the children to be returned to their mother's custody, and Mother does not suggest anything specific. We conclude that the services provided by the Department constituted reasonable efforts on its part.

Mother's final argument involves the missing witness rule, which provides that "the failure of a party to call a witness gives rise to a permissible inference that the missing witness' testimony would have been unfavorable to the party who failed to call the witness." *Gentry v. Gentry*, No. E2000-02714-COA-R3-CV, 2001 WL 839714, at *4 (Tenn. Ct. App., July 25, 2001) (no Tenn. R. App. P. 11 application filed) (citing *State v. Francis*, 669 S.W.2d 85, 88 (Tenn. 1984)). She notes that the Department failed to call as witnesses the two individuals who provided her with domestic violence counseling and mental health counseling and suggests that she is entitled to the inference that their testimony would have been unfavorable to the Department's case if they had been called.

The missing witness rule has been said to apply when the missing witness has knowledge of facts material to the matter at issue, when a relationship exists between the missing witness and a party which would naturally incline the witness to favor the party, and when the missing witness is available to the process of the court for trial. *State v. Francis*, 669 S.W.2d at 88; *Delk v. State*, 590 S.W.2d 435, 440 (Tenn. 1979). The Tennessee Supreme Court has cautioned against several dangers inherent in the operation of the missing witness rule, including the possibility that it may add a "fictitious weight to one side of the case . . . by giving the witness an undeserved significance." *State v. Francis*, 669 S.W.2d at 89 (citing *Dent v. State*, 404 A.2d 165, 171 (D.C. App. 1979)). As a result, the court concluded that the missing witness rule should not be considered a presumption, but merely "as authorizing a permissive inference." *State v. Francis*, 669 S.W.2d at 88.

While the two "missing witnesses" in the present case would presumably have knowledge of material facts as to any progress Mother may have made in response to the counseling they offered her, it is not at all clear that they would naturally be inclined to testify adversely to her or that the Department's failure to call them indicates that their testimony would have been favorable to her case. Mother was their client, and her response to their efforts would be a measure of their effectiveness as counselors. We find that the missing witness rule does not apply in these circumstances.

Additionally, under the Supreme Court's cautions, the trial court was free to accept or reject an inference that the testimony of the two counselors would have been unfavorable to the Department. We find no error in the trial court's actions.

V.

The judgment of the trial court is affirmed. Remand this case to the Juvenile Court of Macon County for any further proceedings necessary. Tax the costs on appeal to the appellant, T.M.

PATRICIA J. COTTRELL, P.J., M.S.